Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, Year 2004

RICHARD Y. TITTERINGTON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Amended Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether or not facts which would support tolling of the statute of limitations, when the government has sought tolling of the statute of limitations pursuant to 18 U.S.C. § 3292, must be submitted to the grand jury, included in the indictment, and proven beyond a reasonable doubt?

LISTING OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,
Appellant

vs.

Stacy Layne Beavers
Robert Murray Bohn
Sherrie-Lee Doreen Cave
Michael Elliot Cole
Geoffrey L. Feldman
Richard Y. Titterington,
Appellees

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

(1) *United States of America v. Richard Titterington, et al.*, ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT, Criminal No. 2-20165, Docket Entry No. 247 (W.D. Tenn., April 23, 2003) (unpublished, reproduced in Appendix)

(2) *United States of America v. Richard Titterington, et al.*, ORDER DENYING THE UNITED STATES' MOTION TO RECONSIDER, Criminal No. 2-20165, Docket Entry No. 258 (W.D. Tenn., May 22, 2003) (unpublished, reproduced in Appendix)

(3) *United States v. Titterington*, 374 F.3d 353 (6th Cir., July 6, 2004), *rehearing en banc denied* (Sep 10, 2004)

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28 U.S.C. § 1254 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Titterington, respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit filed an opinion on July 6, 2004, reversing the dismissal of the indictment in this case by the United States District Court for the Western District of Tennessee at Memphis. [App. 18]. Petition for rehearing en banc was sought, but was denied on September 10, 2004. *Id.*

STATEMENT OF JURISDICTION

Petitioner seeks certiorari review of an Opinion of a United States Court of Appeals. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V
United States Constitution, Amendment VI
18 U.S.C. § 3282(a)
18 U.S.C. § 3292
Fed. R. Crim. Proc. 7

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STATEMENT OF THE CASE

Mr. Titterington respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit, in which the appellate court reversed the dismissal of an indictment on the basis of its failing to include facts which support tolling of the statute of limitations.

Mr. Titterington's case presents a critical constitutional question as to the validity of an indictment when that indictment fails, on its face, to provide notice to the defendant that the applicable statute of limitations has been tolled and also fails to provide notice of the facts supporting such tolling. Additionally, Mr. Titterington's case presents this Court with its first opportunity to address the pleading requirements of the tolling provisions of 18 U.S.C. § 3292.

On May 8, 2002, the United States returned an indictment against Mr. Titterington and several other named defendants. [App. 4]. The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231.

The indictment at issue charged each defendant with violations of 18 U.S.C. § 1962(c) (substantive criminal RICO), 18 U.S.C. § 1962(d) (RICO conspiracy), and 18 U.S.C. § 1341 (mail fraud). [App. 4]. Both the United States and the defendants agreed that the five-year statute of limitations period set forth in 18 U.S.C. § 3282 applied to each of the offenses. *Id.* The indictment, on its face, does not allege facts that would support a conclusion that

offenses were committed within the statute of limitations or would establish that the statute of limitations had been tolled. *Id.* at 4-5.

While it was not listed anywhere in the indictment, Mr. Titterington and the other defendants later learned that the United States had applied, ex parte, for a tolling of the five year statute of limitations, pursuant to 18 U.S.C. § 3292, on the basis of the United States' assertion that evidence of criminal activity was located in Barbados, West Indies, and that the Barbados authorities had yet to take final action on the United States' request to obtain such evidence. [App. 3-4]. Mr. Titterington and other defendants did not obtain written notice of such tolling, and the basis for it, until the § 3292 tolling application and order were attached to a pleading filed by the United States with the district court in response to Mr. Titterington's motion to dismiss. [App. 3].

Mr. Titterington, as well as the other defendants who had at that time made an appearance before the district court, each filed or joined in a motion to dismiss the indictment on the bases that the indictment failed to allege either the commission of a crime within the statute of limitations or facts that tolled the statute of limitations, that the government did not comply with the tolling requirements of 18 U.S.C. § 3292, that 18 U.S.C. § 3292 was unconstitutionally applied in an ex parte manner, and that 18 U.S.C. § 3292 is otherwise unconstitutional. The district court severed those portions of the motion that challenged the compliance of the United States with the procedures of 18 U.S.C. § 3292 and the constitutionality of the actions taken in that regard, reserving those challenges for future determination, if necessary. [App. 2, n.1]. The district court then granted the motions to dismiss the indictment on the ground that it failed to allege the

commission of a crime within the statute of limitations or facts that would toll the statute of limitations so as to place the alleged crime within the limitations period. [App. 10]. The district court further ruled that, in view of its decision to dismiss the indictment for failure to allege jurisdictional facts that comported with the applicable statute of limitations, it would not consider the challenges to the § 3292 procedures and the constitutional issues raised by the moving defendants. [App. 2, n.1]. The basis for the district court's decision was that while an indictment need not negate affirmative defenses, facts supporting the allegation that the offense was committed within the statute of limitations were not facts negating an affirmative defense, and were necessary in order for the indictment to properly charge an offense. [App. 7, 9-11].

The United States filed with the district court what it styled a motion to reconsider on May 1, 2003. The district court entered an order denying the motion to reconsider because the motion was improperly brought and because the district court found it to be without merit. [App. 12].

The United States appealed the decision of the district court dismissing the indictment to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, relying on the method of statutory construction in the decision of this Court in *United States v. Cook*, 84 U.S. 168 (1872), held that "the statute of limitations is an affirmative defense that the Government need not specifically plead in a criminal indictment." [App. 19]. On this basis, the Sixth Circuit reversed the decision of the district court. Mr. Titterington and others filed a motion for reconsideration en banc, but reconsideration was denied on September 10, 2004. [App. 18].

It is respectfully submitted that the analysis and decision of this Court in *United States v. Cook*, 84 U.S. 168 (1872), concerning the sufficiency of an indictment when it fails to allege tolling facts, is inconsistent with later decisions of this Court in *Hamling v. United States*, 418 U.S. 87 (1974); *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Certiorari review should be granted in order to resolve this important question of federal constitutional law.

REASON FOR GRANTING THE WRIT

I. WHETHER OR NOT FACTS WHICH WOULD SUPPORT TOLLING OF THE STATUTE OF LIMITATIONS, WHEN THE GOVERNMENT HAS SOUGHT TOLLING OF THE STATUTE OF LIMITATIONS PURSUANT TO 18 U.S.C. § 3292, MUST BE SUBMITTED TO THE GRAND JURY, INCLUDED IN THE INDICTMENT, AND PROVEN BEYOND A REASONABLE DOUBT?

This Court should provide further clarification, in light of recent decisions of this Court concerning the Fifth and Sixth Amendments, of what are the essential facts which must be included in an indictment necessary to properly allege and prove a criminal offense. It is respectfully submitted that the analysis and decision of this Court in *United States v. Cook*, 84 U.S. 168 (1872), concerning the sufficiency of an indictment when it fails to allege tolling facts and relied upon heavily by the Sixth Circuit in the opinion below, is inconsistent with later decisions of this Court in *Hamling v. United States*, 418 U.S. 87 (1974); *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, 124 S.Ct. 2531 (2004). Certiorari review should be granted in order to resolve this important question of federal constitutional law.

In *Hamling v. United States*, 418 U.S. 87 (1974), this Court discussed what must be charged in an indictment in order to satisfy the Fifth and Sixth Amendments to the United States Constitution and Fed. R. Crim. Proc. 7(c)(1). This Court held that an indictment must contain the elements of the offense charged, fairly inform the

defendant of the charge against which he must defend, and must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling*, 418 U.S. at 117. This Court has also found that in deciding whether or not an indictment is sufficient on its face, courts are limited to the "four corners" of the indictment. *United States v. Sampson*, 371 U.S. 75, 78-79(1962).

This Court has recently confirmed that the Sixth Amendment's notice guarantee requires all facts necessary to the punishment of the defendant to be charged in an indictment. *See Jones v. United States*, 526 U.S. 227 (1999) (discussing Fifth Amendment due process and Sixth Amendment rights to notice requiring charging of all parts of offense in indictment); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same, and applying rule to state prosecution); *Ring v. Arizona*, 536 U.S. 584 (2002) (same, and applying rule to state capital cases); *Blakely v. Washington*, 124 S.Ct. 2531 (2004) (same, and applying rule to aggravating factors within state sentencing guidelines).

The panel decision in *United States v. Titterington*, 374 F.3d 353 (6th Cir., July 6, 2004), *rehearing en banc denied* (Sep 10, 2004), relies heavily on the case of *United States v. Cook*, 84 U.S. 168 (1872), which is devoid of a discussion of the constitutional requirements of indictments, and does not mention in particular the concerns of due process and notice. Rather, the *Cook* opinion focuses on a rule of statutory construction that is inapplicable to the instant case.

It is of note that the recent opinions of this Court discussed above *do not focus on mere statutory construction* when determining which facts must necessarily be alleged in the

indictment in order for constitutional notice to be satisfied; rather, this Court has explicitly stated that in determining whether or not the Fifth and Sixth Amendments as interpreted in *Jones*, *Apprendi*, *Ring*, and *Blakely* are satisfied, *the analysis is not one of mere statutory construction, but rather turns on a matter of effect, not form. Ring*, 536 U.S. at 602 (2002) (citing and quoting *Apprendi v. New Jersey*, 530 U.S. at 494)). Any item which is essential to the prosecution and punishment of an offense must be charged in an indictment and proven to a jury beyond a reasonable doubt. *Id.*

Each of these recent cases from this Court deal with the inclusion in the indictment, and proving to a jury beyond a reasonable doubt, of factors necessary to provide a defendant with a particular sentence. However, the same analysis under the notice requirement of the Sixth Amendment applies with respect to charging facts in an indictment necessary for tolling under 18 U.S.C. § 3292. The panel decision at issue relied heavily on the case of *United States v. Cook*, 84 U.S. 168 (1872), and analogized the situation in this case to that of the case in *Cook*. However, the analysis in *Cook* deals with mere statutory construction, and does not discuss the constitutional issues that have subsequently been thoroughly discussed in more recent Supreme Court cases concerning sufficiency of indictments in light of modern rules of pleading and procedure.

The analysis in *Cook* focuses on whether or not an item is an exception or an element for purposes of its inclusion in the indictment under the common law rules of pleading in effect at the time of the opinion. In deciding this issue, this Court in *Cook* found that if there is an "exception" in the statute defining the offense, then that "exception" must be pleaded in the indictment.

However, the Court also found that if the "exception" is not located in the statute defining the offense, then the "exception" need not be pleaded in the indictment, and that the "exception" was an affirmative defense. *Cook*, 84 U.S. at 173-181. Since the tolling provision was present in a different statute than the statute defining the offense, the *Cook* court held that the tolling provision was an "exception" that need not be pleaded in the indictment.

Additionally, the policy considerations underlying the rigid statutory analysis in the *Cook* opinion are inapplicable to this case. The tolling provision dealt with in *Cook*, and forming the basis for the decision, is vastly different than the tolling provision of 18 U.S.C. § 3292 that has been applied in this case.

The analysis in *Cook* turned on the fact that the tolling provision in that case allowed for a statute of limitations to not apply, at all, if the government presented proof that the defendant fled from justice. *Cook*, 84 U.S. at 178-180. "[B]ut courts ... will not quash an indictment because it appears on its face that it was not within the [limitations] period ... as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception." Id. at 179-80.

However, the tolling provision that was applicable in *Cook* is entirely different from the tolling provision in the instant case. The tolling provision applicable to *Cook* merely stated that the statute of limitations did not "extend to any person or persons fleeing from justice." Id. at 173. The first opportunity for the prosecution in *Cook* to present evidence of tolling was at trial. However, in this case, the prosecution presented evidence to the district court, in an ex parte hearing, in support of its position that

the statute of limitations should be tolled pursuant to 18 U.S.C. § 3292. Subsequent to this ex parte hearing, the district court in this case entered an order tolling the statute of limitations. Therefore, the discussion in *Cook* focusing on not dismissing indictments on the basis of the statute of limitations pursuant to a demurrer is inapplicable to the instant case; here, the prosecution has had "the right to reply or give evidence, as the case may be, that the defendant ... was within the exception [to the limitations period]." *Cook*, 84 U.S. at 179-80.

Applying the statutory construction rule utilized by the *Cook* court is inconsistent with the constitutional protections of due process and notice more recently discussed by this Court in *Hamling v. United States*, 418 U.S. 87 (1974), *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Blakely v. Washington*, 124 S.Ct. 2531 (2004). While *formalistically* the tolling provisions of 18 U.S.C. § 3292 are in a separate statute from the statutes defining the offenses charged in this case, the practical *effect* is that in order for the prosecution to go forward, and for the defendants to be convicted and punished for the offenses charged, the prosecution must satisfy the tolling provisions of 18 U.S.C. § 3292. Therefore, facts supporting tolling of the statute of limitations under 18 U.S.C. § 3292 must be alleged in the indictment in order for the indictment to be constitutionally sufficient.

Accordingly, it is respectfully submitted that certiorari review should be granted in order to resolve this important question of federal constitutional law.

CONCLUSION

For the above reasons, Mr. Titterington respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
RICHARD TITTERINGTON, ET AL,
Defendants.

Criminal No. 2-20165

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS THE INDICTMENT

This matter is before the Court on the motions of Defendants Richard Titterington, Stacy Layne Beavers, Geoffrey L. Feldman, and Robert Murray Bohn ("Defendants") to dismiss the indictment returned against them pursuant to Fed. R. Crim. P. 12(b)(3)(B); Fed. R. Crim Proc. 48(b)(1) & (3); the Fifth Amendment to the United States Constitution; and 18 U.S.C. §§ 3282 & 3292. Specifically, Defendants allege that the indictment should be dismissed because the indictment does not allege facts demonstrating that the indictment was brought within the five-year statute of limitations period applicable for the offenses charged.[1]

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[1] Defendants also contend, in their initial briefs, that 1) the government did not toll the statute of limitations pursuant to

For the following reasons, the Court GRANTS Defendants' motions to dismiss the indictments returned against them.

I. Factual Background and Procedural History

In January 1996, the Federal Bureau of Investigations ("FBI") began investigating Defendants, other co-defendants, and their connections to an entity known as IDM for involvement in an international lottery operation. Govt. Resp. To Defs.' Mot. to Dismiss at 2. During this investigation, the FBI became aware that IDM was located in Bridgetown, Barbados, West Indies, and came to believe that important information pertaining to IDM's operations was located in Barbados. Id. In furtherance of the investigation, the Office of International Affairs for the United States Department of Justice sent the Attorney General of Barbados a Letter of Request, on June 27, 1996, requesting "the issuance and execution of search warrants on IDM offices, storage facilities, the private residence of defendant Al Moss, and for bank records related to IDM." Id. at 3 (citing Ex Parte Motion of the

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18 U.S.C. § 3292 because the government failed to comply with § 3292's procedures; and 2) § 3292 was unconstitutionally applied in an ex parte fashion or else is facially unconstitutional. At a hearing held on March 19, 2003, however, the Court granted Defendants' request that the issue of the government's compliance with § 3292's procedures not be addressed until Defendants have been afforded an opportunity to examine information which they recently sought to compel. See Tr. of Hearing on Defs.' Mot. to Dismiss at 15. Additionally, in light of the analysis below, the Court need not address the constitutional questions regarding the ex parte application of § 3292. Accordingly, these issues will not be discussed in this Order.

United States, In Re: Grand Jury Matter 98-2, Misc. No. 98-EP018-D at 2 (Dec. 9, 1998)). Barbados and FBI officials executed search warrants on July 12, 1996, seizing 140 bankers boxes of "documents significant to the evidentiary value of the on-going FBI investigation." Id. (citing Ex Parte Motion at 3).

Subsequent to these searches, IDM representatives filed court pleadings in Barbados challenging the legality of the searches. The Barbados court granted IDM's motion for an interim order requiring that the boxes be sealed and not removed from Barbados pending a judicial hearing on the matter. Id. at 4 (citing Ex Parte Motion at 4). On March 18, 1998, the Barbados court dismissed the interim order. Id. (citing Ex Parte Motion at 3). IDM gave notice of appeal and moved to enjoin law enforcement from unsealing or removing the seized documents. The Barbados court granted IDM's motion. Id. at 4 (citing Ex Parte Motion at 3).

On December 9, 1998, the United States filed, in this Court, an ex parte motion to suspend the statute of limitations, pursuant to 18 U.S.C. § 3292, due to the difficulties it was encountering in obtaining the evidence located in Barbados. On December 14, 1998, this Court granted the government's motion. On May 8, 2002, the United States returned an indictment against Defendants. At present, the evidence remains in Barbados and has not been provided to U. S. law enforcement authorities. Id. at 4.

The indictment at issue charges each Defendant with violations of 18 U.S.C. § 1962(c) (substantive criminal RICO), 18 U.S.C. § 1962(d) (RICO conspiracy), and 18 U.S.C. § 1341 (mail fraud). Both the United States and Defendants agree that the five-year statute of limitations period set forth in 18 U.S.C. § 3282 applies to each of these offenses. See, e.g., Gov't. Resp. to

Titterington at 15. All parties further agree that, absent tolling of the five-year statute of limitations period prior to the May 8, 2002 return of the indictment, the indictment does not allege the commission by Defendants Titterington, Feldman, Beavers, or Bohn[2] of any racketeering act, overt act in furtherance of the RICO conspiracy,[3] or mail fraud act during the May 9, 1997 to May 8,

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[2] The last act of racketeering by Defendants Titterington, Feldman, and Beavers allegedly occurred on November 12, 1996. Indictment, Count One, Racketeering Act No. 41 ¶ 2. The last overt act in furtherance of the RICO conspiracy by Defendants Titterington, Feldman, and Beavers allegedly occurred on April 27, 1997. Indictment, Count Two, Overt Act No. 61 ¶ 2. Titterington's and Beavers' last mail fraud acts allegedly occurred on July 1, 1996. Indictment, Count 52 ¶ 2. Feldman's last mail fraud act allegedly occurred on January 15, 1997. Indictment, Count 15 ¶ 2. Feldman is also charged with two violations of smuggling under 18 U.S.C. § 545. Feldman's last smuggling act allegedly occurred on July 4, 1996. Indictment, Count 2 ¶ 2.

Bohn's last act of racketeering allegedly occurred on May 7, 1997. Indictment, Racketeering Act No. 121 ¶ 2. Bohn's last overt act in furtherance of the RICO conspiracy allegedly occurred on April 27, 1997. Indictment, Count Two (RICO Conspiracy) ¶ 61. Bohn's last mail fraud act allegedly occurred on January 26, 1996. Indictment, Count 72 ¶ 2.

[3] The government contends that some of the predicate acts in the substantive RICO charge taken by co-Defendants Alvin, Beverly, Jeffrey, and Larry Moss, which occurred within the five-year statute of limitations period, should apply when calculating compliance with the statute of limitations for the RICO conspiracy charge. In determining whether the statute of limitations has run, however, predicate acts in a substantive

2002 statute of limitations period. Finally, all parties agree that the indictment itself does not allege tolling of the statute of limitations. See, e.g., Titterington Mem. at 2, 10 n. 1.

II. Analysis

A. The Parties' Allegations

The United States contends that the indictment need not allege any tolling of the statute of limitations because the issue of statue of limitations is only an affirmative defense, not an essential element of the crimes alleged in the indictment, and therefore need not be alleged in the indictment. Supplem. Resp. of United States at 2-5. Moreover, the government points out that the statute of limitations was indeed tolled after this Court granted the United States' ex parte motion pursuant to 18 U.S.C. § 3292. Conversely, Defendants argue that an indictment must charge specific facts demonstrating that the offense occurred within the applicable statute of limitations period. See, e.g., Titterington Mem. at 9. The central question before this Court, therefore, is whether the indictment must be dismissed for failure to include facts establishing that the alleged offenses occurred within the applicable statute of limitations. The Court finds that this failure is dispositive and the indictment must be dismissed.

RICO count are defendant-specific. United States v. Torres Lopez, 851 F.2d 520 (1st Cir. 1988); United States v. Starrett, 55 F.3d 1525, 1545 (11th Cir. 1995). Therefore, the government may not rely on these predicate acts taken by the Moss family in determining whether the statute of limitations has been met with regard to the RICO charges against Defendants Titterington, Feldman, Beavers, or Bohn.

B. An Indictment Must Allege the Commission of an Offense Within the Time Period of the Applicable Statute of Limitations

For an indictment to be facially sufficient, it must contain each essential element of each offense charged; provide notice to the defendant of the charges against him; and provide information sufficient to protect the defendant against double jeopardy, former acquittal, and former conviction. Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). An indictment is not required to negate defensive matters, McKelvey v. United States, 260 U.S. 353 (1922), nor must it anticipate affirmative defenses to be sufficient. United States v. Neal, 692 F.2d 1296, 1303 (10th Cir. 1982) (citing United States v. Sisson, 399 U.S. 267, 288, 90 S. Ct. 2117, 2128, 26 L. Ed. 2d 608 (1970)).

The Court need not resolve whether the allegation of facts occurring within the applicable statute of limitations period constitutes an essential element of the offense charged because the Sixth Circuit recently confirmed that the statute of limitations constitutes an absolute bar to prosecution, absent explicit waiver by a defendant. United States v. Crossley, 224 F.3d 847, 858 (6th Cir. 2000).[4] As a result, the statute of limitations cannot be construed as a mere affirmative defense or defensive matter. Indeed, the Crossley Court took pains to distinguish prior Sixth Circuit case law which might otherwise treat the statute of limitations as a mere affirmative defense. See Crossley, 224 F.3d at 858 & n.3 (distinguishing United States v. Del Percio, 870 F.2d

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[4] The government does not allege, nor does the Court find, any waiver by Defendants of their statute of limitations claim.

1090 (6th Cir. 1989) and United States v. Craft, 105 F.3d 1123 (6th Cir. 1997)). As Defendants note, Crossley did not directly address the issue of whether the indictment must charge the existence of acts occurring during the statute of limitations period. Resp. to Authority By the Gov't. at 6. The sweeping language of Crossley, however, which held the statute of limitations to be a "jurisdictional bar" to indictments unless the issue was expressly waived by a defendant, is consistent with a requirement that acts occurring within the statute of limitations window must be alleged in the indictment.

The government correctly notes that this position with respect to the nature of the statute of limitations puts the Sixth Circuit at odds with other Circuits holding the statute of limitations to be an affirmative defense. See Gov't. Resp. to Titterington at 2-3; see also United States v. Soriano-Hernandez, 310 f.3d 1099, 1103-04 (8th Cir. 2002) (stating that the First, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits have all held the statute of limitations to be an affirmative defense, not a jurisdictional requirement, while the Sixth and Tenth Circuits have held the statute of limitations to be jurisdictional) (citations omitted). Nevertheless, regardless of the minority status of Crossley's holding, Sixth Circuit precedent is binding on this Court. Thus, the Court does not have jurisdiction over this matter and the indictment must be dismissed.

Moreover, the Court finds persuasive authority[5] for this position from United States v. Gammill, 421 F.2d 185 (10th Cir. 1970). In Gammill, the indictment returned against the defendant omitted the year of the alleged defense. The Tenth Circuit reversed the trial court's denial of the defendant's motion for acquittal based on the insufficiency of the indictment. Gammill, 421 F.3d at 186. The Court stated that "[a] defective allegation of time is a matter of form if time is not an essential element of the offense and if the indictment charges facts showing that the offense was committed within the period of the statute of limitations." Id. (citations omitted). Applying this standard, the court held that "[t]his is not a case where the defect is an incorrect date within the limitation period. Here the omission of the year prevents the indictment from charging an offense within the statute of limitations. The defect was not one of form and the district court was without power to make [any] amendment." Id.; see also United States v. Cline, Nos. 00-40024-03-SAC, 00-40024-06-SAC, 2002 WL 1162424 at *3 (D. Kansas Apr. 5, 2002) ("A court, however, is 'without power' to amend a defective time allegation when the indictment does not allege facts showing the offense was within the statute of limitations.") (quoting Gammill, 421 F.2d at 186); United States v. Benton & Co., Inc., 345 F. Sup. 1101, 1103 (M.D. Fla. 1972) ("An indictment or information is defective where it fails to allege that the offense was committed within the

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[5] Grammill provides particularly compelling authority because, as noted earlier, the Tenth Circuit is the only Circuit other than the Sixth Circuit holding that the statute of limitations constitutes a juridictional bar and not an affirmative defense. See Soriano-Hernandez, 310 F.3d at 1103-04.

time period of the statute of limitations.") (citing Gammill, 421 F.2d at 186).

In the instant case, the government has not simply alleged the wrong year in which it tolled the statue of limitations. Rather, the government wholly omitted any mention of the statute of limitations being tolled. Therefore, as in Gammill, "[t]his is not a case where the defect is an incorrect date within the limitation period. Here the omission of the [tolling of the statute of limitations] prevents the indictment from charging an offense within the statute of limitations." Id. Simply put, the indictment "fails to allege that the offense was committed within the time period of the statute of limitations." Benton, 345 F. Supp. at 1103. Accordingly, the Court finds that the failure to allege facts in an indictment charging an offense within the statute of limitations period deprives the Court of jurisdiction over this matter and therefore requires dismissal of the indictment. Because the indictment does not allege the commission by Defendants of any act occurring within the statute of limitations, or any tolling of the statute of limitations, the Court must dismiss the indictment against Defendants. See Russell v. United States, 369 U.S. 749, 770, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962) (a defective indictment must be dismissed and may only be amended by resubmitting the indictment to the grand jury); United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997).

This determination, however, need not have dire implications for the United States' prosecution of Defendants. Indeed, as counsel for Defendant Titterington admitted during the March 19, 2003 motion to dismiss hearing, the government can simply go back to the grand jury, present information on the tolling

of the statute of limitations, and request a superceding indictment including the fact that the statute of limitations was tolled with respect to each count alleged in the indictment. See Tr. of Hearing on Defs.' Mot. to Dismiss at 26. Until a superceding indictment is returned alleging tolling of the statute of limitations, however, the government is jurisdictionally barred from prosecuting Defendants.

III. Conclusions

For the above-stated reasons, Defendants' motions to dismiss the indictment are **GRANTED**.

IT IS SO ORDERED this 22 day of April, 2003.

s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
RICHARD TITTERINGTON, ET AL,
Defendants.

Criminal No. 2-20165

ORDER DENYING THE UNITED STATES' MOTION TO RECONSIDER

This matter is before the Court on the motion of the United States to reconsider this Court's April 22, 2003 Order Granting Defendants' Motions to Dismiss the Indictment (hereinafter "April 22 Order"). The United States seeks reconsideration of the April 22 Order because it believes that the Indictment includes facts establishing that the alleged offenses occurred within the applicable statute of limitations period. The United States also avers that "[a] case which is strikingly similar to the instant matter," United States v. Wilson, 249 F.3d 366 (5th Cir. 2001), supports the government's position. For the following reasons, the Court DENIES the United States' motion to reconsider the April 22 Order.

I. Discussion

A. Applicable Legal Standard

The Federal Rules of Criminal Procedure make no provision for a motion to reconsider. Courts adjudicating motions to reconsider in criminal cases typically evaluate such motions under the same standards applicable to a civil motion to alter or amend judgment pursuant to Fed. R. Civ. P.. 59(e). See, e.g., United States v. Sims, No. CR. 00-193 MV, 2003 W.L. 1227571 at *4 (D. N.M. March 11, 2003); United States v. Thompson, 125 F. Supp. 2d 1297 (D. Kan. 2000). A motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) may be made for one of three reasons:

1) An intervening change of controlling law;

2) Evidence not previously available has become available; or

3) It is necessary to correct a clear error of law or prevent manifest injustice.

Fed. R. Civ. P. 59(e); Helton v. ACS Group, 964 F. Supp. 1175, 1182 (E.D. Tenn. 1977). Rule 59(e) is not intended to be used to "relitigate issues previously considered" or to "submit evidence which in the exercise of reasonable diligence, could have been submitted before." Id. at 1182; see also Voelkel v. Gen. Motors Corp., 846 F. Supp. 1482, 1483 (D. Kan.), aff'd, 43 F.3d 1484 (10th Cir. 1994) (stating that a motion for reconsideration "is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed.") When a movant offers "essentially the same arguments presented on the original motion, the proper vehicle for relief is an appeal." Id. at 1182 (citing Keweenaw Bay Indian Community v. State of Michigan, 152

F.R.D. 562, 563 (W.D. Mich. 1992), aff'd, 11 F.3d 1341 (6th Cir. 1993)). Thus, there are limited circumstances in which a court may grant a motion for reconsideration. In fact, the Supreme Court stated that Congress' intent in adopting Fed. R. Civ. P. 59(e) "had a clear and narrow aim." White v. N.H. Dept. of Employment Sec., 455 U.S. 445, 450, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). The aim was to empower district courts "to rectify [their] own mistakes in the period immediately following the entry of judgment." Id., at 450; Treckiak v. State of Ohio, 117 F.3d 1421 (6th Cir. 1997) (unpublished opinion); Windsor v. Fed. Executive Agency, 614 F. Supp. 1255, 1264 (M.D. Tenn. 1984).

B. Analysis

The government does not allege in its motion that the April 22 Order is invalid because a change in controlling law has occurred or evidence not previously available has become available. Therefore, the Court can only reconsider the April 22 Order if doing so is "necessary to correct a clear error of low or prevent manifest injustice." Fed. R. Civ. P. 59(e). The government has not established either a clear error of law[1] or

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[1] It is unclear whether the United States disputes the Court's application of United States v. Crossley, 224 F.3d 846 (6th Cir. 2000). On page six of its brief, the government "does not dispute" the statement in the April 22 Order that Crossley ""confirmed that the statute of limitations constitutes an absolute bar to prosecution, absent explicit waiver by a defendant."' Mot. for Recons. at 6 (quoting April 22 Order at 5). Conversely, on page seven of its brief, the government contends that Crossley supports its position that the "statute of limitations is an affirmative defense." Id. at 7. The Court need not reconcile these antithetical statements, however, because the government's

manifest injustice in the April 22 Order. Instead, the government rests its entire motion for reconsideration on its statement that "[t]he applicable limitations period for the offenses charged in the indictment is eight (8) years, not five (5) years, and specific facts, including the dates of each of the offenses occurring within the eight (8) year period, are set forth in the Indictment." Mot. for Recons. at 2. this assertion, which contests the Court's application of applicable law to the facts in this case, does not constitute grounds for reconsideration under Fed. R. Civ. P. 59(e) and must therefore be rejected. Indeed, the United States' motion to reconsider "is nothing but a request for the court to revisit the same issues previously rejected." United States v. West, No. 01-40122-01; 2002 WL 1334870 at *1 (D. Kan. May 9, 2002).

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latter contention is legally inaccurate: Crossley expressly rejected construing the statute of limitations as an affirmative offense, instead making it a jurisdictional bar. Crossley, 224 F.3d at 858. Although the narrow issue in Crossley dealt with whether or not the statute of limitations was waivable, the clear holding the Sixth Circuit applies to the nature of the statute of limitations in general and therefore easily encompasses the issue at bar in this case. See id. at 858 ("[We] hold that, absent an explicit waiver, the statute of limitations presents a bar to prosecution that may be raised for the first time on appeal.").

Additionally, the Court rejects any suggestion by the United States that United States v. Wilson depicts the applicable law in the instant action. Wilson is inapposite because, as made clear in the April 22 Order, only the Sixth and Tenth Circuits treat the statute of limitations as a jurisdictional bar, whereas the Fifth Circuit–and all other Circuits–treat the statute of limitations as an affirmative defense that need not be anticipated in the indictment. See April 22 Order at 6; see generally McKelvey v. United States, 260 U.S. 353 (1922); Crossley, 224 F.3d at 858.

Moreover, even in the government's motion was proper, the Court must reject it on the merits. The normal statute of limitations for the offenses charged in the indictment is five years. See April 22 Order. Noting within the four corners of the indictment states, or even suggests, that anything other than the normal statute of limitations should apply. To determine the facial validity of an indictment, the Court is confined to the four corners of the indictment. See United States v. Sampson, 371 U.S. 75, 78-79, 83 S. Ct. 173, 9 L. Ed. 2d 136 (1962); United States v. Marra, 481 F.2d 1196, 1199 (6th Cir. 1973). The facts giving rise to the offenses charged in the indictment against Defendants all occurred after the five year statute of limitations period concluded. Failure to allege facts in an indictment occurring within the applicable statute of limitations "presents a bar to prosecution." Crossley, 224 F.3d at 858. Accordingly, regardless of whether the Court properly granted the United States an extension of the statute of limitations, the United States erred in failing to mention this extension within the four corners of the indictment and is therefore barred from prosecuting Defendants under the current defective indictment. Only the government, not the Court, can cure this error by seeking a superceding indictment including mention of the tolling of the statute of limitations pursuant to 18 U.S.C. § 3292.

II. Conclusions

For the above-stated reasons, the United States' motion to reconsider dismissal of the indictment is **DENIED**. The Court's May 5, 2003 temporary stay of the April 22 Order dismissing the indictment shall remain in effect until thirty (30) days following entry of this Order.

IT IS SO ORDERED this 21 day of May, 2003.

s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
United States District Judge

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Richard TITTERINGTON, et al., Defendants-Appellees.

No. 03-5829.

Argued April 20, 2004.
Decided and Filed July 6, 2004.
Rehearing En Banc Denied Sept. 10, 2004.

Before BOGGS, Chief Judge; DAVID A. NELSON and SUTTON, Circuit Judges.

SUTTON, J., delivered the opinion of the court, in which BOGGS, C.J., joined. NELSON, J. (p. 460), delivered a separate opinion concurring in the judgment and in the opinion of the court.

SUTTON, Circuit Judge.

As this case comes to the court, all agree that a federal indictment need not specifically state that the charged offenses occurred within the pertinent statute-of-limitations period; it suffices that the indictment alleges facts establishing that the offense occurred within the limitations period. What happens, however, when the Government obtains permission to toll the limitations period? Must the Government in that setting

specifically allege that the limitations period has been tolled or otherwise allege that the indictment covers offenses that occurred within the extended limitations period? The district court said yes; we say no. Contrary to the views of the district court, we conclude that the statute of limitations is an affirmative defense that the Government need not specifically plead in a criminal indictment. We therefore reverse the district court's judgment in favor of the defendants and remand the case for further proceedings.

I.

In January 1996, the FBI began an investigation of the defendants in this case--Richard Titterington, Geoffrey Feldman, Sherrie-Lee Doreen Cave, Robert Murray Bohn, Stacy Layne Beavers and Michael Elliot Cole--regarding their involvement with a Barbados-based entity known as IDM. According to the United States, the defendants and IDM ran an international lottery operation, which defrauded United States citizens of more than $100 million. Believing that IDM's Bridgetown, Barbados headquarters held evidence of this criminal conduct, the Office of International Affairs of the Department of Justice obtained a warrant from the Barbados government in June 1996 to search IDM's headquarters. Barbados authorities, assisted by the FBI, executed the warrant on July 12, 1996, seizing approximately 140 boxes of evidence that were "significant to the ... on-going FBI investigation." JA 498.

After the search, IDM officials challenged the validity of the warrant. A local Barbados court ordered that the evidence remain in Barbados pending a hearing as well as any appeal, then placed the evidence under seal, which in this instance meant locking the 140 boxes of evidence in a jail cell. The evidence

remained in the jail cell at the time the district court entered judgment in this case, and it remains there today.

Claiming that the evidence it needed to prosecute these defendants was itself in prison, the United States filed an ex parte motion in federal district court on December 9, 1998, to toll the limitations period for these alleged criminal offenses. Under the mail fraud, RICO and anti-smuggling statutes, a five-year limitations period generally governs criminal allegations under these provisions. *See* 18 U.S.C. § 3282(a). But a separate federal statute permits the Government "before return of an indictment" to file an application "indicating that evidence of an offense is in a foreign country" and requesting that the limitations period be extended. *Id.* § 3292(a)(1). Under this second statute, if "the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears ... that such evidence is ... in such foreign country," the court must "suspend the running of the statute of limitations" until "the foreign court or authority takes final action on the request," but for no longer than three years. *Id.* § 3292(a)(1), (b) & (c)(1). As the Barbados court appeared nowhere near taking "final action" in the evidentiary matter, the district court granted the motion to suspend the statute of limitations for up to three years.

On May 8, 2002, a federal grand jury returned an 89-count indictment against the six defendants involved in this appeal and 11 other co-defendants who remain outside United States jurisdiction and for whom extradition requests have been lodged with various countries. The indictment charged the defendants with violations of 18 U.S.C. § 1962(c) (substantive RICO), 18 U.S.C. § 1962(d) (RICO conspiracy) and 18 U.S.C. § 1341 (mail

fraud). In addition, the indictment charged that one of the defendants, Feldman, violated 18 U.S.C. § 545 (smuggling).

Defendants moved to dismiss the indictment, arguing that an indictment must allege that an offense occurred within the applicable statute-of-limitations period. The district court (through the same judge who granted the Government's tolling motion) granted the defendants' motion to dismiss. "[T]o be facially sufficient," the court noted, an indictment must "contain each essential element of each offense charged," must "provide notice to the defendant of the charges against him" and must provide "information sufficient to protect the defendant against double jeopardy." JA 500-01. At the same time, the court added, an indictment need not "negate defensive matters ... nor ... anticipate affirmative defenses." JA 501. Recognizing that one might naturally think of the statute of limitations as a "defense" that falls outside of the pleading requirements for a facially valid indictment, the district court nonetheless concluded that "the statute of limitations cannot be construed as a mere affirmative defense or defensive matter" because in this Circuit the statute-of-limitations argument may be made for the first time on appeal. *See United States v. Crossley*, 224 F.3d 847, 858 (6th Cir.2000). Construing the statute of limitations as a "jurisdictional bar" and finding no allegation in the indictment that the crimes occurred within the limitations period or that the limitations period had been tolled, the court held that it lacked "jurisdiction over this matter" and that "the indictment must be dismissed." JA 501-02. The Government appealed.

II.

A.

The appropriate standard for reviewing a district court's decision whether to dismiss an indictment is not entirely clear. As the parties observe, we have treated the issue differently at different times, in some cases describing our task as abuse-of-discretion review, in other cases describing our task as de-novo review. *Compare, e.g.*, United States v. DeZarn, 157 F.3d 1042, 1046 (6th Cir.1998) (de novo), *with* United States v. Middleton, 246 F.3d 825, 841 (6th Cir.2001) (abuse of discretion). In this case, as in many cases involving an allegedly flawed indictment and as the parties themselves here agree, the distinction does not make a difference, as an error of law compels a reversal under either standard of review. *See* United States v. Taylor, 286 F.3d 303, 305 (6th Cir.2002) ("[A]n erroneous legal determination is always an abuse of discretion.").

B.

In federal court, a criminal defendant "shall [not] be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," U.S. Const. amend. V, and the defendant "shall enjoy the right ... to be informed of the nature and cause of the accusation," U.S. Const. amend. VI. Consistent with these constitutional commands, Rule 7(c)(1) of the Federal Rules of Criminal Procedure says that an "indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment complies with all of these requirements, the Supreme Court has held, if it (1) "contains the elements of the offense charged," (2) "fairly informs a defendant of the charge against which he must defend" and (3) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

While an indictment must satisfy these three notice-related requirements, "[i]t has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses." *United States v. Sisson*, 399 U.S. 267, 288, 90 S.Ct. 2117, 26 L.Ed.2d 608 (1970). "[A]n indictment ... founded on a general provision defining the elements of an offense ... need not negative the matter of an exception made by a proviso or other distinct clause.... [I]t is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey v. United States*, 260 U.S. 353, 357, 43 S.Ct. 132, 67 L.Ed. 301 (1922); *see Evans v. United States*, 153 U.S. 584, 590, 14 S.Ct. 934, 38 L.Ed. 830 (1894) ("Neither in criminal nor in civil pleading is [the Government] required to anticipate or negative a defense.").

In addition to giving general guidance that the elements of a criminal charge must be in the indictment while allegations negating the elements of an affirmative defense need not be, the Supreme Court has held that a statute-of-limitations claim falls on the affirmative-defense side of the line. In *United States v. Cook*, 17 Wall. 168, 84 U.S. 168, 21 L.Ed. 538 (1872), a grand jury indicted a paymaster in the Army under an act of Congress making it a crime to embezzle public funds. A different statute imposed a two-year limitations period on the offense but also provided that the limitations period did not "extend to any person or persons fleeing from justice." *Id.* at 173. Arguing that "it appears on the face of the indictment ... that the crime charged ... was committed more than two years before the indictment," the paymaster "demurred" to the indictment--which is to say, he admitted the

allegations in the indictment, then argued that he could not be convicted even if they were true. *Id.* at 172.

The Supreme Court rejected the argument, holding that a defendant may not "by demurrer [ ] set up the statute of limitations as a defence" just "because another act of Congress provides that no person shall be prosecuted, tried, or convicted of the offence unless [ ] indict[ed] ... within two years." *Id.* at 178. "Accused persons may avail themselves of the statute of limitations by special plea [*i.e.*, by raising an affirmative defense] or by evidence under the general issue [*i.e.*, by presenting evidence at trial]," the Court explained, "but courts ... will not quash an indictment because it appears on its face that it was not found within the [limitations] period ... as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception [to the limitations period]." *Id.* at 179-80. Nor would a "different rule [ ] apply ... if the statute of limitations did not contain any exception," the Court continued, because time is not an element of the offense. *Id.* at 180; *see also Biddinger v. Comm'r of Police*, 245 U.S. 128, 135, 38 S.Ct. 41, 62 L.Ed. 193 (1917) ("The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases.").

More than a century later, *Cook* remains good law and governs the outcome of this dispute. In this case, as in *Cook*, the statute defining the offenses does not contain a statute of limitations, but "another act of Congress" does. As in *Cook*, that other act sets forth a limitations period, which contains an exception. And, as in *Cook*, a court may not dismiss an indictment just "because it appears on its face that it was not found within the

[limitations] period" because to do so "would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant ... was within the exception [to the limitations period]." 84 U.S. at 179-80. Nor, as in *Cook*, would a "different rule [ ] apply ... even if the statute of limitations did not contain any exception," *id.* at 180, as time is not an essential element of a mail-fraud, RICO or smuggling offense. As *Cook* makes clear, the statute of limitations for mail-fraud, RICO and smuggling prosecutions does not impose a pleading requirement on the Government, but merely creates an affirmative defense for the accused.

III.

Defendants raise several challenges to this conclusion, all unconvincing. At oral argument, defendants claimed that *Cook* is a relic of common-law pleading and has no application to the modern Federal Rules of Criminal Procedure. But to say that *Cook* does not control because it spoke of "demurrers," "special pleas" and "evidence under the general issue" instead of using the up-to-date terminology of the Federal Rules gives too much credit to linguistic trends and too little credit to the stability of the law. All of these antiquated terms of course have modern analogues, just as today's terminology is apt one day to have future analogues of its own. In this case, for example, a pretrial motion alleging a "defect in the indictment" under the Federal Rules, *see* Fed.R.Crim.P. 12(b)(3)(B), represents the modern equivalent of a "demurrer" because both pleadings serve to attack the facial validity of the indictment. *See United States v. Ponto*, 454 F.2d 657, 660 (7th Cir.1971) ("In 1946, the Federal Rules of Criminal Procedure abolished the use of common law procedures such as a

demurrer and plea in abatement and substituted in their place the motion to dismiss the indictment under Rule 12."). Because a demurrer and a motion alleging a defect in the indictment perform the same core function, *Cook's* essential holding--that the statute of limitations concerns an affirmative defense (which need not be pled), not an element of the offense (which must be pled)--has continuing currency under the Federal Rules. *See United States v. Parrino*, 203 F.2d 284, 287 (2d Cir.1953) (L.Hand, J.) ("Rule 12(a) abolished all defensive pleadings except 'not guilty,' and provided that 'defenses ... which heretofore could have been raised' by demurrer 'shall be raised only by motion to dismiss.' From that it follows that, since the question decided in *United States v. Cook* [ ] could not be raised by demurrer under the old practice, it may not now be raised by motion to dismiss and, if so, it must be raised by the plea of 'not guilty.' ").

The defendants next argue that, no matter what *Cook* says, this Circuit has determined that the statute of limitations contained in 18 U.S.C. § 3282 is not merely defensive but is "jurisdictional," which supports the district court's ruling. As defendants correctly observe, *United States v. Crossley*, 224 F.3d 847, 858 (6th Cir.2000), held that "absent an explicit waiver, the statute of limitations [under § 3282] presents a bar to prosecution that may be raised for the first time on appeal." Relying on *Crossley* and echoing the district court's reliance on *Crossley*, defendants argue that the statute of limitations must be jurisdictional because a defendant may raise it for the first time on appeal, which in turn means that the Government must *plead* the statute of limitations in order to vest the district court with "jurisdiction" over the indictment.

Crossley does not support this string of inferences. It does not say anything about what an indictment must contain, let alone mention the Supreme Court's *Cook* decision. Nor does it say that a statute of limitations is "jurisdictional."

Although *Crossley* says that the statute of limitations may be raised for the first time on appeal, not every issue that may be raised for the first time on appeal is jurisdictional. Just this Term, the Supreme Court highlighted the flaw in this reasoning. In *Kontrick v. Ryan*, 540 U.S. 443, ----, 124 S.Ct. 906, 915, 157 L.Ed.2d 867 (2004), the Court observed that just because "[a] litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance," and just because "a debtor may challenge a creditor's objection to a discharge as untimely ... at any time in the proceedings, even initially on appeal," does not mean that the rules governing the timeliness of a creditor's objection "have the same import as provisions governing subject-matter jurisdiction." A "critical difference" between subject-matter jurisdiction and the timing rules at issue in *Kontrick*, the Court explained, is that the former "cannot be expanded to account for parties' litigation conduct" and the latter can be. *Id.* at 916. Courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions," the Court noted, but the label "can be confounding" because such prescriptions do not generally affect personal or subject-matter jurisdiction. *Id.* at 915 (quotation and citation omitted); *see also Scarborough v. Principi*, --- U.S. ----, ----, 124 S.Ct. 1856, 1858, --- L.Ed.2d ----, ---- (2004).

In challenging the district court's jurisdiction over this criminal indictment, the defendants make a similar mistake. The

federal courts' subject-matter jurisdiction to hear federal criminal prosecutions comes from 18 U.S.C. § 3231, which grants "[t]he district courts of the United States ... original jurisdiction ... of all offenses against the laws of the United States." A true jurisdictional problem--say, the Federal Government prosecutes a defendant for a non-federal crime--cannot be waived or altered by the parties' conduct during the proceeding. As mail fraud, RICO and smuggling are "offenses against the United States," however, § 3231 grants the district courts jurisdiction--the power to hear the case--no matter how much time elapsed between the criminal conduct and the criminal indictment and no matter what the Government ultimately proves or fails to prove. *See United States v. Rayborn*, 312 F.3d 229, 231 (6th Cir.2002) (holding that the interstate-commerce requirement of the federal arson statute "is not jurisdictional in the sense that it affects a court's subject-matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case"); *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir.1999) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231, and there can be no doubt that Article III permits Congress to assign federal criminal prosecutions to federal courts. That's the beginning and the end of the 'jurisdictional' inquiry.").

Were the statute of limitations jurisdictional in the sense that defendants claim, moreover, an individual could not explicitly waive its protection, *see United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) ("subject-matter jurisdiction .... can never be forfeited or waived"), which *Crossley* itself says a defendant can do and which many defendants desire to do. For example: some defendants plead guilty to a time-barred

lesser offense with a shorter limitation period in exchange for the Government dropping charges on a greater offense with a longer limitation period; other defendants request jury instructions on a time-barred lesser offense to avoid giving the jury an all-or-nothing-at-all choice. *See* Spaziano v. Florida, 468 U.S. 447, 454-57, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (suggesting that a capital defendant has a due process right to a jury instruction on a time-barred lesser included offense so long as he waives the statute of limitations for that offense). All of this explains why the federal courts of appeals that have addressed this issue uniformly agree that the statute of limitations provides an affirmative defense that the defendant may waive. *See* United States v. Soriano-Hernandez, 310 F.3d 1099, 1103-04 (8th Cir.2002); United States v. Najjar, 283 F.3d 1306, 1309 (11th Cir.2002); Acevedo-Ramos v. United States, 961 F.2d 305, 307 (1st Cir.1992); United States v. Cooper, 956 F.2d 960, 962 (10th Cir.1992); United States v. Arky, 938 F.2d 579, 581-82 (5th Cir.1991); United States v. DeTar, 832 F.2d 1110, 1114 (9th Cir.1987); United States v. Karlin, 785 F.2d 90, 92-93 (3d Cir.1986); United States v. Meeker, 701 F.2d 685, 687-88 (7th Cir.1983); United States v. Walsh, 700 F.2d 846, 855-56 (2d Cir.1983); United States v. Williams, 684 F.2d 296, 299-300 (4th Cir.1982); United States v. Wild, 551 F.2d 418, 421-25 (D.C.Cir.1977).

Had *Crossley* said what the defendants claim it said--a court lacks subject-matter jurisdiction if the indictment does not plead the statute of limitations--*Crossley* no longer would be good law. As the Supreme Court recently held in *Cotton*, "defects in an indictment do not deprive a court of its power to adjudicate a case"

and thus are not "jurisdictional." 535 U.S. at 630-31, 122 S.Ct. 1781.

Neither does *Crossley* say that because failing to *prove* compliance with the statute of limitations establishes a "bar to prosecution," *pleading* the statute of limitations must be mandatory (even if it is not jurisdictional). The Double Jeopardy Clause and the Ex Post Facto Clause also establish a bar to criminal prosecution. Yet no case to our knowledge mandates that indictments must allege that the Government did not previously prosecute the defendant for the same offense or that the defendant completed the crime after Congress criminalized the conduct. If these constitutional defenses do not alter the normal rules for pleading crimes, it is hard to understand why this statutory defense should do so.

The Tenth Circuit's decision in *United States v. Gammill*, 421 F.2d 185 (1970), does not suggest otherwise. There, the court held that a district court lacked authority to amend an indictment that omitted the year in which the alleged crime took place, without first submitting the new indictment to a grand jury. *Id.* at 186. Here, in marked contrast, the indictment *does* mention the year in which the alleged crimes took place and that year falls within the eight-year limitations period (five years plus three years) under 18 U.S.C. §§ 3282 & 3292.

Even if a run-of-the-mill indictment need not mention the statute of limitations, defendants argue that "tolling" cases are different and require the Government to allege that "the limitations period for this crime was tolled for three years" or perhaps that "the prosecution would comply with the statute of limitations as computed under 18 U.S.C. §§ 3282 & 3292." But the defendants

offer no pertinent authority for this proposition and fail to explain why *Cook,* which itself involved an exception to the statute of limitations (for a fleeing felon), does not squarely control the outcome of this case.

IV.

For the foregoing reasons, we reverse the district court's judgment dismissing the indictment and remand the case for further proceedings consistent with this opinion.

DAVID A. NELSON, Circuit Judge, concurring.

I fully concur in the judgment and in Judge Sutton's opinion for the court. Perhaps it would not be amiss, however, for me to add a word on the question of our standard of review, given the tension between my unqualified assertion in *United States v. Powell,* 823 F.2d 996, 1001 (6th Cir.1987), that "[w]e review a district court's refusal to dismiss an indictment only for abuse of discretion" and my unqualified concurrence in Judge Rosen's opinion in *United States v. DeZarn,* 157 F.3d 1042 (6th Cir.1998), which asserted that "[t]he sufficiency of the indictment is reviewed *de novo.*" *Id* at 1046.

I suppose a pedant could claim that *Powell* is not directly in point here, the case at bar not being one that gives us occasion to "review a district court's refusal to dismiss an indictment...." But were it not for the fact that, as Judge Sutton has generously pointed out, "an erroneous legal determination is always an abuse of discretion," see *United States v. Taylor,* 286 F.3d 303, 305 (6th Cir.2002), I would be hard pressed to deny that the logic of my statement in *Powell* is at odds with the logic of Judge Rosen's statement in *DeZarn.* And I am at a loss to know what I could have

been thinking of when I said what I said in *Powell;* the *Powell* statement (which I must have expunged from my memory in the ensuing decade) now strikes me as wide of the mark, while Judge Rosen's statement in *DeZarn* strikes me now--as it did when I concurred in it--as right on target.

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3282(a)

Offenses not capital

(a) In general.--Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3292

Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States

or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

FEDERAL RULE OF CRIMINAL PROCEDURE 7

The Indictment and the Information

(a) When Used.

(1) Felony. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

(b) Waiving Indictment. An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant--in open court and after being advised of the nature of the charge and of the defendant's rights--waives prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated. For purposes of an indictment referred to in section 3282 of title 18,

United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in that section 3282.

(2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information provides notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute.

(3) Citation Error. Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) Surplusage. Upon the defendant's motion, the court may strike surplusage from the indictment or information.

(e) Amending an Information. Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

(f) Bill of Particulars. The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.

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